Supreme Court, U.S.
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In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1996

PROTECTIVE LIFE INSURANCE COMPANY,

*Petitioner,*

v.

LAZARD FRERES & CO.,

*Respondent.*

## Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

## PETITION FOR WRIT OF CERTIORARI

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68 pp

## QUESTION PRESENTED

The Second Circuit held, under New York law, that a "sophisticated" party's reliance upon another's representations of fact is "unreasonable" as a matter of law, in the context of a claim of fraud in the inducement to a contract, unless that party inserts a condition precedent into the contract, conditioning the contract on the truth of the representations.

The question presented here is: Was this far-reaching proposition, which is irreconcilable with such long-standing New York precedents as *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 157 N.E.2d 597 (1959) and *Sabo v. Delman*, 3 N.Y.2d 155, 143 N.E.2d 906 (1957), correctly espoused by the Second Circuit as New York law?

## LIST OF PARTIES PURSUANT TO RULE 29.6

The only parent company of the plaintiff, appellee and respondent in this proceeding, Protective Life Insurance Company ("Protective"), is Protective Life Corporation. Protective's only nonwholly owned subsidiary is American Foundation Life Insurance Company, all of the capital stock of which is owned by Protective or by Protective Life Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

LIST OF PARTIES PURSUANT TO RULE 29.6 ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

PETITION FOR WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED IN THIS CASE ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 6

I. The Second Circuit's Opinion Directly Conflicts With Landmark New York Precedents And Is Contrary To Policy Judgments Made By The New York Court Of Appeals ..... 6

II. Even If *Danann* And *Sabo* Were Not Clearly Controlling, Certiorari Would Be Appropriate To Certify The Question To The New York Court Of Appeals ..... 14

CONCLUSION ..... 15

APPENDIX ..... App. 1

## TABLE OF AUTHORITIES

Page

Cases

*Angerosa v. The White Co.*, 290 N.Y.S. 204 (N.Y. App. Div. 1936), *aff'd*, 275 N.Y. 524 (1937) ..... 7

*Atherton v. FDIC*, ___ U.S. ___, 117 S. Ct. 666 (1997) ..... 11

*Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956) ..... 12

*Bridger v. Goldsmith*, 143 N.Y. 424, 38 N.E. 458 (1894) ..... 7

*CBS, Inc. v. Ziff-Davis Pub. Co.*, 75 N.Y.2d 508, 553 N.E.2d 997 (1990) ..... 8 n.1

*Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.*, 583 N.Y.S.2d 478 (N.Y. App. Div. 1992). ..... 4, 9, 12, 13

*Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 157 N.E.2d 597 (1959) ..... passim

*Elkins v. Moreno*, 435 U.S. 647 (1978) ..... 14

*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) ..... 10

*Forsyth v. City of Hammond*, 166 U.S. 506 (1897) ..... 13

*Jackson v. State of New York*, 205 N.Y.S. 658 (N.Y. App. Div. 1924) ..... 8

*Lehman Brothers v. Schein*, 416 U.S. 386 (1974) ..... 15

## TABLE OF AUTHORITIES

Page

*Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) ..... 13

*Rodas v. Manitaras*, 552 N.Y.S.2d 618 (N.Y. App. Div. 1990) ..... 4, 9, 12, 13

*Sabo v. Delman*, 3 N.Y.2d 155, 143 N.E.2d 906 (1957) ..... passim

*Shepherd v. Whispering Pines, Inc.*, 591 N.Y.S.2d 246 (N.Y. App. Div. 1992) ..... 9, 12, 13

*Swift v. Tyson*, 10 L. Ed. 865 (1842) ..... 10

*United States v. General Motors Corp.*, 323 U.S. 373 (1945) ..... 13

*Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988) ..... 14

*Yurish v. Sportini*, 507 N.Y.S.2d 234 (N.Y. App. Div. 1986) ..... 13

*Zant v. Stephens*, 462 U.S. 862 (1983) ..... 14

Other Authorities

Jack G. Stern, *A 2d Circuit Decision on Fraudulent Inducement, Which Places the Burden on the Purchaser to Discover Misrepresentations, Appears to Go Against Precedent*, National Law Journal, June 30, 1997, at B4 ..... 10, 13

## TABLE OF AUTHORITIES

Page

Statutes

New York Court of Appeals Rules of Practice § 500.17 ..... 2

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on March 26, 1997, in order either to harmonize that opinion with New York law as reflected in such landmark decisions as *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 157 N.E.2d 597 (1959) and *Sabo v. Delman*, 3 N.Y.2d 155, 143 N.E.2d 906 (1957), or to certify the question here presented to the New York Court of Appeals for decision.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is published at *Lazard Freres & Co. v. Protective Life Insurance Company*, 108 F.3d 1531 (2d Cir. 1997). The memorandum and order of the United States District Court for the Southern District of New York, 94 Civ. 3959 (Knapp, J.) which was appealed from is available on Lexis at 1996 U.S. Dist. LEXIS 5898. By order filed April 24, 1997, the Second Circuit denied Protective's petition for rehearing. All of the foregoing are reprinted in Appendix A ("App.") hereto.

## JURISDICTION

On May 3, 1996, the United States District Court for the Southern District of New York entered a Memorandum and Order granting summary judgment to the plaintiff. On May

24, 1996, defendant filed its notice of appeal to the United States Court of Appeals for the Second Circuit. By decision dated March 26, 1997, the United States Court of Appeals for the Second Circuit vacated the summary judgment that had been entered by the District Court and remanded the case to the District Court. Protective timely petitioned for rehearing, but, on April 24, 1997, its petition was denied. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

## STATUTES INVOLVED IN THIS CASE

New York Court of Appeals Rules of Practice § 500.17 provides, in pertinent part, as follows:

> **§ 500.17 Discretionary Proceedings to Review Certified Questions From Federal Courts and Other Courts of Last Resort**
>
> (a) Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of the Court of Appeals, such court may certify the dispositive questions of law to the Court of Appeals.
>
> (b) The certifying court shall prepare a certificate which shall contain the caption of the

case, a statement of facts setting forth the nature of the cause and the circumstances out of which the questions of New York law arise, and the questions of New York law, not controlled by precedent, which may be determinative, together with a statement as to why the issue should be addressed in the Court of Appeals at this time.

(c) The certificate, certified by the Clerk of the certifying court under its official seal, together with the original or copies of all relevant portions of the record and other papers before the certifying court, as it may direct, shall be filed with the Clerk of the Court of Appeals.

* * *

(g) When a determination is rendered by the Court of Appeals with respect to the questions certified, it shall be sent by the Clerk of the Court of Appeals to the certifying court.

## STATEMENT OF THE CASE

In its decision, the Second Circuit enunciated a startling legal proposition that would deprive a party defrauded into entering into a contract of its fraudulent inducement defense to an action on the contract, unless that party also prevails upon a

defense of the failure of a condition precedent. The court stated:

> As a substantial and sophisticated player in the bank debt market, Protective was under a further duty to protect itself from misrepresentation. It could easily have done so by insisting on an examination of the [allegedly misrepresented document] as a condition of closing. *See Rodas v. Manitaras*, 552 N.Y.S.2d 618, 620 (N.Y. App. Div. 1990).
>
> > [W]here, as here, a party has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation *or inserting appropriate language in the agreement for his protection*, he may truly be said to have willingly assumed the business risk that the facts may not be as represented. Succinctly put, a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament.

*Id.* (emphasis added). We believe the failure to insert such language into the contract – by itself – renders reliance on the misrepresentation unreasonable as a matter of law. *See Curran, Cooney, Penney, Inc. v. Young & Koomans,*

*Inc.*, 583 N.Y.S.2d 478, 479 (N.Y. App. Div. 1992).

108 F.3d at 1543, App. at 26-27 (footnote omitted).

The proposition articulated above had neither been argued by Lazard Freres & Co. ("Lazard") nor briefed by either party. Protective therefore moved for rehearing, urging that the Second Circuit either reconsider this portion of its opinion, or else certify the question of its correctness to the New York Court of Appeals. Protective's petition for rehearing was denied.

## REASONS FOR GRANTING THE WRIT

### I. The Second Circuit's Opinion Directly Conflicts With Landmark New York Precedents And Is Contrary To Policy Judgments Made By The New York Court Of Appeals

In *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 157 N.E.2d 597 (1959), the New York Court of Appeals definitively established the ground rules under New York law with respect to the effect on fraudulent inducement claims of contractual *disclaimers* of reliance upon representations. It held that while a *specific* disclaimer of reliance upon the type of representation offered as the basis of a fraudulent inducement claim would bar the claim, a mere *general* disclaimer of reliance upon representations cannot operate to shield a misrepresenting party from his or her fraud. Numerous New York cases have applied this doctrine faithfully in the nearly forty years since *Danann*.

In *Danann* and its progeny it is self-evident that the representation in question was not embodied in the contract, as a condition precedent or otherwise. Indeed, the question of the effect of a disclaimer – whether specific or general – simply would not arise where the representation in question is embodied in the contract. Thus, a necessary corollary of the rule enunciated in *Danann* is that even where a general disclaimer of reliance exists – and none exists on the facts of this case – a claim of fraud in the inducement is *not* barred by reason of failure of the victim of the fraud to insert the representations (or an associated condition precedent) into the contract.

Likewise, in *Sabo v. Delman*, 3 N.Y.2d 155, 159, 143 N.E.2d 906, 908 (1957), the New York Court of Appeals resoundingly rejected a contention – virtually identical to the holding of the Second Circuit below – "that, since the alleged representations were not set forth in the written contracts, they could not be asserted or relied upon by the plaintiff." Indeed, even where a general merger clause is present in the contract – and none is present in the agreement at issue here – the Court of Appeals held in *Sabo* that "the parol evidence rule has no application in a suit brought to *rescind* a contract on the ground of fraud. In such a case, it is clear evidence of the assertedly fraudulent oral misrepresentation may be introduced to avoid the agreement." 3 N.Y.2d at 161, 143 N.E.2d at 908. Thus, the New York Court of Appeals in *Sabo* explicitly rejected the contention that a plaintiff can be required to insert representations into his or her contract as a prerequisite to an action for fraud in the inducement.

The Second Circuit's holding below not only directly conflicts with *Danann* and *Sabo*, but is contrary to policies articulated much earlier by the New York courts. The opinions in *Danann* and *Sabo* rested upon and reaffirmed the reasoning in *Bridger v. Goldsmith*, 143 N.Y. 424, 38 N.E. 458 (1894)("I assume that there is no authority that we are required to follow in support of the proposition that a party who has perpetrated a fraud upon his neighbor may, nevertheless, contract with him in the very instrument by means of which it was perpetrated, for immunity . . ."), *Angerosa v. The White Co.*, 290 N.Y.S. 204 (N.Y. App. Div. 1936), *aff'd*, 275 N.Y. 524 (1937)("To deny relief to the victim of a deliberate fraud because of his own negligence would encourage falsehood and dishonesty. . . . In this jurisdiction protection is given to one who is injured by falsehood or deception; fraud vitiates everything it touches,

and destroys the very thing which it was devised to support; the law does not temporize with trickery or duplicity") and *Jackson v. State of New York*, 205 N.Y.S. 658 (N.Y. App. Div. 1924)("The effect of misrepresentation and fraud cannot be thus easily avoided"). These policies cannot be reconciled with the view that the burden is on a contracting party "to protect itself from misrepresentation", such that the party has no remedy for fraud in the inducement because it is "responsible for its own predicament" unless it has protected itself by an express condition precedent. Such a principle turns *Danann* on its head, since *Danann* held that the burden is on the seller to obtain a specific disclaimer of reliance – not on the buyer to negotiate an express condition precedent.

By holding that reliance is "unreasonable as a matter of law" where there is no condition precedent, the Court effectively writes fraudulent inducement out of New York law, substituting instead a mandatory "condition precedent" as the only insurance against those who would fraudulently induce a "sophisticated" businessperson to enter into a contract. But a "condition precedent" is not and never has been – until the Second Circuit's decision below – an element of fraudulent inducement; likewise, if there is a condition precedent that is not met, there is no need to prove fraud. [1]

[1] Indeed, in *CBS, Inc. v. Ziff-Davis Pub. Co.*, 75 N.Y.2d 508, 553 N.E.2d 997 (1990), the New York Court of Appeals held that where a warranty similar to the language that the Second Circuit required below *is* bargained for and included in the contract, reasonable reliance upon the representations in question need not be established at all. This is yet another way in which the Second Circuit's decision is out of harmony with definitive New York precedents.

The Second Circuit acknowledged that the few New York authorities it relied upon were mere *dicta,* and also at least implicitly recognized that certification of this issue to the New York Court of Appeals might have been desirable. Thus, the Second Circuit wrote:

> *Rodas* was a case in which the contract contained an express disclaimer of reliance clause, thus bringing it under the rule of *Danann. See Rodas*, 552 N.Y.S.2d at 619-20. While its precedential value in this case would therefore appear suspect, the principle for which it is here cited has been reaffirmed in a case that did not involve a contractual disclaimer of reliance. *See Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.*, 583 N.Y.S.2d 478, 479 (N.Y. App. Div. 1992). It is true that the references to the duty to secure protective contractual language in both *Rodas* and *Curran* are *dicta* insofar as in each of those cases the information was not peculiarly within the defendant's knowledge. We nonetheless find this *dicta* indicative of the law of New York, *see also Shepherd v. Whispering Pines, Inc.*, 591 N.Y.S.2d 246, 249 (N.Y. App. Div. 1992), and note that neither party has sought certification on this issue. [2]

[2] Whether the parties had "sought certification on this issue" should not have been a criterion, because the legal principle in question had not even been argued by Lazard, and thus had not been posited clearly enough to provide Protective with a fair opportunity to consider and address certification.

108 F.3d at 1543 n. 11, App. at 27, n.11. Not only did the Second Circuit thus implicitly recognize that its decision reflects a departure from existing law, but subsequent legal commentary has done so explicitly. *See* Jack G. Stern, *A 2d Circuit Decision on Fraudulent Inducement, Which Places the Burden on the Purchaser to Discover Misrepresentations, Appears to Go Against Precedent*, National Law Journal, June 30, 1997, at B4 (observing that the decision below "appears to have departed from recent trends", that "[s]uch a condition precedent . . . has never been an element of the fraudulent-inducement defense", and that "it is somewhat perplexing that the 2d Circuit seems to have linked the two concepts" of reasonable reliance and conditions precedent).

Ever since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), it has been well-established that "[t]here is no Federal general common law"; that Federal courts sitting in diversity cases are obligated to follow the law of a state as adopted by its highest court; and that the notion previously articulated in *Swift v. Tyson*, 10 L. Ed. 865 (1842) that a Federal court may instead follow its own lights in discerning "the principles established in the general commercial law" is entirely discredited. Nevertheless, the Second Circuit below fashioned its own standard of conduct – based upon its own sense of progressive public policy – justifying itself in doing so by observing that Protective "is the party that removed the case to the federal courts" and that neither party had "asked" the Second Circuit to certify these issues to the New York Court of Appeals. 108 F.3d at 1541 n.8, 1543 n.11; App. at 22 n.8, 27 n.11. [3] This is contrary not only to *Erie*, but to principles

[3] That the Second Circuit's opinion puts policy over precedent was clearly revealed at argument, where its author forcefully as-

(Continued . . .)

recently articulated in *Atherton v. FDIC*, ___ U.S. ___, 117 S. Ct. 666 (1997):

> "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. . . . [W]hen courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." . . . Indeed, such a "conflict" is normally a "precondition."

1175 S. Ct. at 670 (citations omitted). Since no conflict with any federal policy or interest exists or was claimed to exist here, the Second Circuit should have attempted faithfully to apply the existing precedents in the New York Court of Appeals, such as *Danann* and *Sabo*.

(. . . Continued)

serted that "It would not be unreasonable for a State to say that we do not want to create an opportunity for buyers – to create a question of fact for a jury – in any number of oral transactions, which we all know then have settlement value, because they're costly, they have all sorts of problems; so that it would not be strange – *it might not be right but it would not be strange* – for a jurisdiction to say, rather, when we can have a rule which says you are sophisticated, you can get this information, therefore you must, in order to avoid situations which then become complicated jury trials with settlement value" (emphasis supplied). The Second Circuit thus appears to have fashioned a writing requirement akin to the statute of frauds – a classically legislative prerogative – under cover of a heretical "spin" on New York's reasonable reliance requirement.

Here, as in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 205 (1956), "there appears to be no confusion in the [New York] decisions, no developing lines of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinion of [New York] judges on the question, no legislative development that promises to undermine the judicial rule." As the Second Circuit acknowledged, *Rodas* involved a specific written disclaimer of reliance on the very type of representations alleged, and the court in *Rodas* cited both *Danann* and *Sabo* as controlling authority, stating that "[t]he standard which a party claiming fraud must meet *in order to overcome a specific disclaimer clause* is set forth in" *Danann*. 552 N.Y.S.2d at 620 (emphasis added). By relying on the observation in that context that the parties "could have included a condition subsequent", the Second Circuit did not merely rely upon *dicta*, but applied the legal standard for "overcoming a specific disclaimer clause" in a case where even the Second Circuit recognized that "[n]o such contractual disclaimer is present. . . ." 108 F.3d at 1542. In *Curran* the basis of decision was that the plaintiffs had been "put on notice" that the facts "may not have been as represented", and the fact that the plaintiff had not asserted "appropriate language into the agreement for his protection" was a mere observation of fact. 583 N.Y.S.2d at 479. Likewise, in *Shepherd* the court merely observed in passing that the defrauded parties "could have protected themselves by including a condition subsequent", while the basis of decision was their admission that they considered the alleged "misrepresentation" to be nothing more than "an honest guess." 591 N.Y.S.2d at 249.

Furthermore, even the Second Circuit recognized that in *Rodas* and *Curran* "the information was not peculiarly within the defendant's knowledge", 108 F.3d at 1543 n.11, App. at

27, n.11, while in this case "Protective did not . . . have access to the relevant information." 108 F.3d at 1542, App. at 25. Under these circumstances, *Danann* would preclude summary judgment even if a specific disclaimer of reliance had existed. *See Yurish v. Sportini*, 507 N.Y.S.2d 234, 235 (N.Y. App. Div. 1986). For all of these reasons, none of the cases cited by the Second Circuit evidences any departure from *Danann* and *Sabo*, and the Second Circuit's forced inference from passing language in *Rodas*, *Curran* and *Shepherd* does not withstand analysis.

The issue presented here is not a mere academic or episodic one, *see Rice v. Sioux City Memorial Park Cemetery, Inc.* 349 U.S. 70, 74 (1955), but one with far-reaching implications in the world of complex commercial transactions. *See Stern, supra* (observing that the decision below "creates the potential for a fundamental shifting of burdens and costs" and that, under the decision below, "the ability of a buyer to retain the freedom not to contract, and to assert defenses based on a seller's misrepresentation, has become far less predictable"). Inasmuch as Rule 10 of this Court states that the criteria listed therein are "neither controlling nor fully measuring the Court's discretion", Petitioner respectfully submits that a writ of certiorari is appropriate to review so profound a revision of fundamental business law. And in light of the sweeping precedential impact of the ruling below and the degree to which the holding of the Second Circuit would alter any subsequent trial, we submit that interlocutory certiorari is appropriate. *See United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)("We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case"); *Forsyth v. City of Hammond*, 166 U.S. 506, 514-15 (1897)(stating that interlocutory certiorari is appropriate

"when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between . . . courts of appeal and the courts of a state, or some other matter affecting the interests of this nation in its internal or external relations, demands such exercise").

## II. Even If *Danann* And *Sabo* Were Not Clearly Controlling, Certiorari Would Be Appropriate To Certify The Question To The New York Court Of Appeals

The policy question at hand has far reaching consequences in the context of commercial transactions, and directly implicates leading New York precedents such as *Danann* and *Sabo*. Even if these Court of Appeals decisions were not directly controlling – though we submit that they are – the associated questions of policy would best be evaluated by the New York Court of Appeals. Indeed, the Second Circuit itself recognized that the appropriateness of certification presents a genuine issue here. 108 F.3d at 1543 n. 11, App. at 27 n.11.

After granting certiorari, it is appropriate for this Court to certify questions of state law to the highest court of a state where there are no controlling precedents in that court's prior decisions. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395-96 (1988)("it is essential that we have the benefit of the law's authoritative construction from the Virginia Supreme Court"); *Zant v. Stephens*, 462 U.S. 862, 870 (1983)("We therefore sought guidance from the Georgia Supreme Court pursuant to Georgia's statutory certification procedure"); *Elkins v. Moreno*, 435 U.S. 647, 1347-48 n.16 (1978)("where as here there is an efficient method for obtaining a ruling from

the highest court of a State we do not hesitate to avail ourselves of it").

The Court has recognized that when a certification procedure exists, it "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). New York Court of Appeals Rule 500.17 provides such a procedure. We therefore respectfully submit that certification to the New York Court of Appeals would be appropriate if *Danann* and *Sabo* were deemed not clearly controlling, and that this prospect is appropriately taken into consideration in evaluating the propriety of a writ of certiorari.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 616—August Term, 1996
(Argued: December 4, 1996 Decided March 26, 1997)
Docket No. 96-7664

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LAZARD FRERES & CO.,

*Plaintiff-Counter-Defendant-Appellee,*

v.

PROTECTIVE LIFE INSURANCE COMPANY,

*Defendant-Counter-Claimant-Appellant.*

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Before:

VAN GRAAFEILAND, JACOBS AND CALABRESI,
*Circuit Judges.*

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Protective Life Insurance Company ("Protective") appeals from an order entered on May 3, 1996, in the United States District Court for the Southern District of New York (Knapp, J.), granting summary judgment to Lazard Freres &

Co. ("Lazard") in its claim against Protective for breach of contract.

Vacated and remanded.

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J. DOUGLAS RICHARDS, O'Sullivan Graev & Karabell, New York, N.Y. (Andrew D. Manitsky, of counsel), for *Defendant-Counter-Claimant-Appellant.*

BRAD S. KARP, Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y. (Steven C. Herzog, of counsel), for *Plaintiff-Counter-Defendant-Appellee.*

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CALABRESI, *Circuit Judge*:

This breach of contract action between two large and sophisticated bank debt traders involves the attempted sale of several million dollars worth of bank debt. Because it concluded, as a matter of law, that the defendant could not show fraud in the inducement or failure of a condition precedent, the district court granted the plaintiff's summary judgment motion. The district court's decision ultimately turns on two factual issues addressed only implicitly by the court: 1) the date on which the contract was formed; and 2) whether the defendant retained the right to perform a diligent review of the relevant documents up to the date of closing. We believe that facts material to each of these questions remain in genuine dispute, and we therefore vacate and remand. We note, however, that if on remand the defendant fails to convince the fact finder as to

either of these factual issues, the plaintiff must prevail as a matter of law.

## BACKGROUND

Plaintiff Lazard Freres & Co. ("Lazard") is an investment bank and registered broker-dealer. Defendant Protective Life Insurance Co. ("Protective") is "one of the biggest, most successful bank debt players in the marketplace." [1] Its subsidiary, Protective Asset Management Corp. ("PAMCO"), handles a bank debt portfolio valued at $760 million.

On the morning of January 28, 1994, Lazard agreed to purchase $10 million (face value) of bank debt issued by Maxwell Communications Corp. (the "MCC bank debt"). Lazard attempted to turn around and sell the debt immediately. Kevin Murphy, a Lazard sales representative, called a number of his customers to try to interest them in the purchase. One of the customers he called was Mark Okada, a principal of PAMCO. Murphy left an "urgent" message at Okada's office in California for Okada to call him back. At the time, Okada was in Disney World, attending a high yield bond conference. When he received the message, Okada called Murphy from a pay phone.

The telephone conversation between Murphy, Okada, and Michael Weinstock, a Lazard analyst, lasted approximately eleven minutes. During that conversation, Murphy described the MCC bank debt to Okada and explained to him that if Protective wanted to purchase the debt, it had to act fast,

[1] The Joint Appendix in this case has been filed under seal. All references in this opinion to its contents are to information also contained in the unsealed briefs.

indeed that very day, as a letter to MCC's creditors (the "Scheme Report") describing the debt was in transit to the market and would become public very soon. According to Protective, Murphy represented that he had knowledge of the contents of the Scheme Report, and that it would verify, among other things, that twenty percent of the face amount of the debt was going to be paid in March 1994, and that there were no outstanding litigations against MCC that would reduce the value of the debt. [2] If Protective were to act right away – before the Scheme Report became known in the market – Murphy allegedly told Okada, Protective could purchase the debt at an excellent price.

Okada did not immediately commit to buying the debt. Instead, he consulted with his boss, James Dondero, who was with him at the conference in Disney World. Dondero allegedly gave Okada the go-ahead to make the purchase, so long as he received oral representation from Lazard that "the 20 cents of the 41 cents we were paying [was] escrowed, bullet-proof, coming to us in March." Okada called Murphy back, and – according to Protective – orally agreed to purchase the bank debt at 41 1/2 cents on the dollar.

Lazard prepared a final written contract (the "Written Confirmation") that afternoon, dated it January 28, 1994, and immediately sent it to Protective to be signed. Four days later, Lazard sent a copy of the Scheme Report by overnight mail, and that document was duly received by Protective on February 2. On February 8, Protective signed the Written Confirmation. Although the Scheme Report was in Protective's

[2] Lazard vigorously denies that these statements were made, but for the purposes of summary judgment, we must assume that they were.

possession for the six days prior to its signing of the Written Confirmation, and although Protective claimed to be relying on Lazard's characterization of what was contained in that Report, Protective failed to read the Report before signing the Written Confirmation.

Both the oral and written agreements had been "conditioned upon the preparation, review and execution of documentation acceptable to Lazard and Protective" prior to closing, as was the custom for these deals. In late February 1994, Okada, in the course of going over the closing documents, finally read the Scheme Report. He immediately became convinced that Lazard had misrepresented its contents. Apparently, the Scheme Report did not guarantee, as Lazard had supposedly alleged, that twenty percent of the debt would be paid in March and that there were no significant outstanding litigations against MCC that could reduce the value of the debt.

Believing that it had been misled, Protective refused to negotiate the final closing documentation needed to complete the purchase of the bank debt. In March 1994, the price of the MCC bank debt dropped substantially. Unable to close its deal with the recalcitrant Protective, Lazard was forced to sell the debt to another purchaser at a much lower price.

Lazard brought suit in the New York State Supreme Court in April 1994, alleging breach of contract on the part of Protective and seeking $538,210.53 in damages to cover its loss. Protective removed the action to the federal district court. In its response, Protective asserted two affirmative defenses: 1) fraud in the inducement (and justifiable reliance thereon); and 2) failure of a condition precedent (the

finalization of closing documents). Protective conceded that the failure to finalize the closing was due to its own refusal to negotiate, but it argued that this was wholly justified by Lazard's misrepresentations and by a provision in the contract that Protective alleges gave it the right to void the deal upon review of the Scheme Report up to the time of closing.

On May 3, 1996, the district court granted Lazard's motion for summary judgment. *See Lazard Freres & Co. v. Protective Life Ins.* Co., No. 94 Civ. 3959, 1996 WL 223975 (S.D.N.Y. May 3, 1996). Noting that the parties disagreed as to whether New York, California, or Alabama law should be used to determine Protective's defense of justifiable reliance, Judge Knapp chose not to decide that question. Instead, he concluded that even under Alabama law, which both parties conceded was most favorable to Protective, Protective, as a sophisticated and major player in the bank debt market, was not justified in relying on Lazard's characterization of the contents of the Scheme Report. Since it had the Report in its possession, Protective was duty bound to read it before signing the Confirmation. As to Protective's condition precedent argument, Judge Knapp held that

> a person who refuses to read a document that has been in its possession for six days can[not], as a matter or law, justifiably contend that it was defrauded by misrepresentations as to the contents thereof. Therefore, Protective failed as a matter of law to negotiate in good faith, and such conduct excused the failure of the condition precedent.

*Id.* at *3. The district court did not address Protective's claim that it had the right under the contract to void the agreement, upon review of the Scheme Report, at any time prior to closing.

This appeal followed.

## DISCUSSION

We review a grant of summary judgment *de novo,* drawing all factual inferences and resolving all ambiguities in favor of the nonmoving party. *See, e.g., Gummo v. Village of Depew,* 75 F.3d 98, 107 (2d Cir.), *cert. denied,* 116 S. Ct. 1678 (1996). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Thus, "[i]f, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper." *Gummo,* 75 F.3d at 107. The party seeking summary judgment bears the burden of demonstrating the absence of any genuine factual dispute. *Celotex Corp. v., Catrett,* 477 U.S. 317, 322-23 (1986).

### *I. The date on which Protective became bound to purchase the MCC bank debt from Lazard*

The district court's opinion was premised on the assumption that the purchase of the MCC bank debt did not occur until Protective signed the Written Confirmation. At that point, said Judge Knapp, Protective was not justified in relying on Lazard's representations concerning the contents of the Scheme Report, since Protective had, for six full days, been in

possession of that Report without reading it. On appeal, Protective challenges that underlying assumption. It argues that, subject to its retained right to "the preparation, review and execution of documentation" prior to closing, it was contractually bound to purchase the debt as a result of Okada's and Murphy's oral agreement in their second telephone conversation on January 28, 1994. Protective therefore claims that the reasonableness of its reliance on Lazard's misrepresentations should be measured as of January 28, not February 8, 1994. Protective argues:

> Since Protective made its commitment to purchase the [MCC bank] debt on January 28, 1994, and since those on both sides of the transaction regarded the subsequent written confirmation as a mere confirmation of the earlier oral agreement, the District Court erred, and improperly gave the benefit of strained inferences to the movant on summary judgment, by viewing Protective's mere signature to the written confirmation of a pre-existing commitment as a necessary occasion for Protective to revisit its prior decision . . . . When properly analyzed in the context of the oral commitment made on January 28, 1994, Protective's reliance upon Lazard is justifiable even under New York law.

Protective provides ample evidence to support its theory. Witnesses for both sides testified that Okada stated, "We're done," upon reaching agreement on January 28, and that that statement meant: "I own that – I own that bank debt at 41 and a half." Protective alleges that "we're done" is the statement

customarily understood in the bank debt community to indicate that a contract has been reached. Indeed, John V. Doyle, the head of Lazard's high yield bond sales group, testified:

> There is a basic tenet on Wall Street and in the markets that goes something along the lines of my word is my bond. What that means is that when someone enters into a transaction, they are bound to see it through to closure. In securities, bonds, stocks, et cetera, my word is my bond happens when one side of the trade says to the other, okay, you're done.

More importantly, the Written Confirmation itself is dated January 28, 1994, and states not that Lazard wishes to enter into a contract, but rather that Lazard "wishes to confirm our agreement." Lazard itself conceded below that "Okada committed to purchase the MCC bank debt" on January 28, 1994. In addition, an internal memorandum prepared by Murphy apparently sometime in March 1994 indicates that Murphy attempted to reach Okada while he was out of town in order to "consummate" a trade before the Scheme Report became public the following Monday. Finally, Okada testified:

> Our business practice is that on the – on January 28th when I talked to Kevin [Murphy] and . . . Michael Weinstock that we had already committed to purchase the [MCC] bank debt based on the representations that they had made on the phone so our deal was already consummated as of then . . . .
>
> If you're asking me whether we take a commitment letter seriously, we do, but we also

> take verbal commitments seriously also, and this was simply a written confirmation of that verbal commitment.

Lazard responds by noting that the Written Confirmation states that Protective "indicate[s] . . . acceptance and agreement to the terms contained *herein*" (emphasis added), which implies that the terms of the Written Confirmation constitute the legally binding agreement. In addition, Lazard points out that Protective itself, in its pleadings, averred that Okada signed the Written Confirmation on February 8 "[i]n justifiable reliance" upon Lazard's misrepresentations, which implies that Protective did not consider itself bound until that point. Lazard alleges that Protective only switched to its theory that it was bound as of January 28 when it realized that it had negligently failed to read the Scheme Report before signing the Written Agreement. Finally, Lazard offers a policy argument:

> Protective cites no authority whatsoever for the proposition that this Court should disregard the parties' February 8 written agreement in favor of a supposed previous oral understanding, and we are aware of none. The practical consequences of such a ruling, moreover, would be disastrous. Parties to business transactions would be discouraged from conducting due diligence before signing written agreements, in the hope that they could later argue that they were misled into entering such agreements. Such a ruling also would reward grossly negligent conduct like that of Protective here, involving an admitted failure by seasoned investment professionals to read a supposedly

> critical document underlying a multi-million-dollar investment before signing a written contract binding their company to purchase that investment.

Lazard's response does not satisfy us that there is no genuine factual issue as to the date at which Protective became bound. As for Lazard's emphasis on the word "herein" in the Written Confirmation, that word seems no more convincing than the language that Protective quotes: Lazard "wishes to confirm our agreement." And, in any event,

> [i]n a contract dispute a motion for summary judgment may be granted only where the agreement's language is unambiguous and conveys a definite meaning . . . . If the language is susceptible to different reasonable interpretations, and where there is relevant extrinsic evidence of the parties' actual intent, then the contract's meaning becomes an issue of fact precluding summary judgment.

*Sayers v. Rochester Tel. Corp. Supplemental Management Pension Plan,* 7 F.3d 1091, 1094 (2d Cir. 1993)(citations and internal quotation marks omitted); *see also Hartford Accident & Indemnity Co. v. Wesolowski,* 305 N.E.2d 907, 909 (N.Y. 1973).

Nor are we convinced by the part of Protective's initial pleadings relied upon by Lazard. To the extent that the pleadings may suggest that Okada believed that he was bound only upon signing the Written Confirmation on February 8, they are substantially contradicted by Okada's unambiguous deposition testimony, quoted above. Under the circumstances, this part

of Protective's answer should not be taken as a concession that there is no issue of fact on the point.

Finally, Lazard's policy argument is misplaced. The question is not whether due diligence ought to be favored. Even Protective acknowledges its importance. The question is rather the time when due diligence was expected to take place, and the time when the agreement became binding subject to that due diligence. Was Protective expected to check the documents (including the Scheme Report) before binding itself to purchase the debt by signing the Written Confirmation, or was the signing of the Written Confirmation merely a ministerial act to acknowledge the previously binding oral agreement, under which Protective had the right to perform some due diligence (by reviewing the documentation) at any time prior to the formal closing? This is precisely the question of fact that Protective disputes, and Lazard has failed to provide any evidence that would establish that a jury could not rationally agree with Protective's characterization of the parties' intent. *See Ronan Assocs., Inc. v. Local 94-94A-94B, Int'l Union of Operating Eng'rs.*, 24 F.3d 447, 449 (2d Cir. 1994)("Under traditional principles of contract law, questions as to what the parties said, what they intended, and how a statement by one party was understood by the other are questions of fact. . . ."); *V'Soske v. Barwick,* 404 F.2d 495, 499 (2d Cir. 1968)("[T]he mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event."); *Jardella v. Welin Davit & Boat Corp.*, 220 N.Y.S. 115, 120 (N.Y. App. Div. 1927) ("It is a common experience in ordinary business life that parties come to an oral agreement, and that subsequently, one or both of the parties write confirmatory letters. In such cases it is considered that the

oral agreement constitutes the real contract between the parties, and that the letters are to be treated merely as evidence of what had previously been orally agreed upon. . . ."); *Stites v. Yelverton,* 289 P.2d 628, 630 (N.M. 1955)("Parties to an oral, informal agreement may or may not become bound prior to the execution of a contemplated formal writing, depending upon their intention to be or not to be so bound. What is intended is a question of fact depending upon the circumstances of the case."); *Peoples Drug Stores, Inc. v. Fenton Realty Corp.*. 62 A.2d 273, 275 (Md. 1948)("The question whether the parties negotiating a contract intended to be bound by their oral agreement but contemplated a written instrument merely a[s] evidence of their agreement, or whether they did not intend to bind themselves until a contract was prepared and signed by them, must be decided from the facts and circumstances in each particular case.").

It may be that in the bank debt market a party is not bound by an oral commitment, and the operative moment is instead the signing of a written confirmation. It may also be that if a party enters into an oral agreement before performing due diligence, it is commonly understood that that party retains the right to perform due diligence before signing a written confirmation, but not later still *(i.e.* prior to signing the closing documents). [3] But at summary judgment we cannot say that either of these is the case. The burden of establishing the absence of a genuine issue of material fact rested on Lazard, as the moving party, and it is clear that on these points it has not met its burden. As such, we must proceed under the assumption that Protective was bound to purchase the MCC

[3] The question of whether Protective retained the right to perform due diligence by reviewing the Scheme Report prior to closing is further discussed in Part IV, *infra.*

bank debt on January 28, 1994, subject only to document review before closing. Thus, the grant of summary judgment can only be affirmed if, under the applicable state law, Protective's reliance as of that date was unjustifiable as a matter of law. [4]

[4] Lazard argued for the first time at oral argument that Protective could not have been bound by any oral agreement on January 28, 1994, because such an agreement would have been unenforceable under the statute of frauds. The thrust of this argument is that Protective could not have been bound, and could not legitimately have believed itself to be bound, since the oral agreement was unenforceable at law until Protective signed the Written Confirmation. It may be that this is a valid argument. It is not, however, an argument that we can accept at this point.

The applicability of the statute of frauds is complex and often fact dependent. As a result, we cannot say with certainty that Lazard would have been unable to enforce the alleged oral agreement had Protective refused to sign the Written Confirmation. For one thing, the contract would have been enforceable up to $5,000. *See Grappo v. Alitalia Linee Aeree Italiane, S.p.A.*, 56 F.3d 427, 431 (2d Cir. 1995). Moreover, Lazard may well have been able to discover an internal document of Protective's acknowledging the oral agreement, and thus satisfying the statute. *See* E. ALLEN FARNSWORTH, CONTRACTS § 6.7, at 426-27 (2d ed. 1990) (noting that the statute can be satisfied by, among other things, a receipt, an invoice, or corporate minutes, even if those documents were not directed to the other party). Or Protective might have acknowledged the contract in court or to third parties. *Cf. Rail Europe, Inc. v. Rail Pass Express, Inc.*, No. 94 Civ. 1506, 1996 WL 157503, at *4 (S.D.N.Y. Apr. 3, 1996) ("Since defendant has admitted to the existence of an agreement between the parties, the Statute of Frauds does not bar enforcement of that agreement."). Or Lazard may have been able to show that, in reliance on Protective's promise, it completed the purchase of the MCC bank debt and ceased its

(Continued . . .)

*II. Choice of law*

A federal court sitting in diversity must apply the choice of law rules of the forum state, in this case New York. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). This court has recently explained the New York choice of law rule in breach of contract cases:

(. . . Continued)

attempts to sell the debt [to] other brokers. *See* RESTATEMENT (SECOND) OF CONTRACTS § 139 (1979) ("A promise which the promisor should reasonably expect to induce action . . . on the part of the promisee . . . and which does induce the action . . . is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise."); *Onbank & Trust Co. v. James P. Burr Enters. Inc.*, 652 N.Y.S.2d 802, 804 (N.Y. App. Div. 1997). In light of all of these possibilities, and of the fact that Lazard failed to raise this issue until oral argument on appeal, so that Protective was unable to establish a factual basis for these or other possibilities, we will not assume that the statute of frauds would have barred Lazard's enforcement of the oral agreement had Protective not signed the Written Confirmation. *Cf.* FARNSWORTH, *supra*, § 6.10, at 446 ("[i]t is generally agreed that the statute [of frauds] cannot be raised for the first time on appeal."); *Telecommunications Tech. Corp. v. Deutsche Bank AG*, 652 N.Y.S.2d 291, 291-92 (N.Y. App. Div. 1997) (same). While that is not technically what Lazard has done here (it has not raised the statute as a substantive defense to a breach of contract claim), many of the reasons behind the rule are persuasive in this situation as well.

Lazard remains free to raise the statute of frauds on remand. Given the hypothetical nature of the inquiry, it is unlikely that Lazard will be able to establish conclusively that it could not have enforced the oral agreement had Protective refused to sign the Written Confirmation. Still, Lazard may be able to use the statute of frauds as an indication of the parties' intent not to be bound by the oral agreement.

Until the latter part of this century, New York courts employed a "traditional, 'territorially oriented' approach to choice-of-law issues which applied the law of the geographical place where one key event occurred, such as the place of the wrong in tort cases or where an agreement was entered into or performed in contract cases." *Istim, Inc. v. Chemical Bank,* 78 N.Y.2d 342, 347, 575 N.Y.S.2d 796, 798, 581 N.E.2d 1042, 1044 (1991). More recently, however, New York courts, recognizing that "[a] State may lack sufficient nexus with a case so that choice of its law is arbitrary, or fundamentally unfair," abandoned these rigid rules in favor of a more flexible approach. *Cooney v. Osgood Mach., Inc.,* 81 N.Y.2d 66, 70-71, 595 N.Y.S.2d 919, 921, 612 N.E.2d 277, 279 (1993). Under this more flexible approach, New York courts seek to apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute. *Babcock v. Jackson,* 12 N.Y.2d 473, 481-82, 240 N.Y.S.2d 743, 749, 191 N.E.2d 279, 283-84 (1963).

In contract cases, New York courts now apply a "center of gravity" or "grouping of contacts" approach. *Id.* Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. *In re Allstate Ins. Co. and Stolarz,* 81 N.Y.2d 219,

> 227, 597 N.Y.S.2d 904, 908, 613 N.E.2d 936, 940 (1993). New York courts may also consider public policy "where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests." *Id.* at 226, 597 N.Y.S.2d at 907, 613 N.E.2d at 939. The traditional choice of law factors, the places of contracting and performance, are given the heaviest weight in this analysis. *Id.*

*Brink's Ltd. v. South African Airways,* 93 F.3d 1022, 1030-31 (2d Cir. 1996), *cert. denied,* 117 S. Ct. 959 (1997). [5]

[5] To complicate the matter somewhat, courts often appear to be confused as to whether New York courts apply the same choice of law rules to tort claims and contract claims.

In New York, "the relevant analytical approach to choice of law in tort actions" is the "interest analysis." *Schultz v. Boy Scouts,* 480 N.E.2d 679, 684 (N.Y. 1985). That is, "the law of the jurisdiction having the greatest interest in the litigation will be applied." *Id.* Many courts, including at one point our own, have considered this test to be interchangeable with the "grouping of contacts" test used in contract cases. *See, e.g., Hormel Int'l Corp. v. Arthur Andersen & Co.,* 390 N.Y.S.2d 457, 458 (N.Y. App. Div. 1977) ("With respect to both contracts and torts, the 'center of gravity', or 'grouping of contacts', theory now governs the choice of law, and the applicable law is the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue rased in the litigation.")(citation and internal quotation marks omitted); *Wm. Passalacqua Builders v. Resnick Developers,* 933 F.2d 131, 137 (2d Cir. 1991) ("Choice of law issues involving contractual disputes are resolved in New York by an interest analysis, and therefore the law of the jurisdiction having the greatest interest in the litigation con-

(Continued . . .)

Applying this test, the district court concluded

> that New York law applies to Lazard's claim for breach of contract. The contract at issue was drafted in New York, negotiated in New York and Florida, and executed in New York and California. Under New York conflicts rules, the center of gravity of the MCC transaction was New York, not California or Florida. Alabama and Tennessee had absolutely no contact with this contract, except for being the principal place of business and the place of incorporation, respectively, of Protective.

*Lazard Freres,* 1996 WL 223975 at *2. [6] The district court's reasoning, however, treats the contract as being the Written Confirmation. If instead we assume, as we must *(see supra*

(. . . Continued)

trols.") (citations and internal quotation marks omitted); *Anglo American Ins. Group v. CalFed, Inc.,* 940 F. Supp. 554, 557 (S.D.N.Y. 1996) ("In New York, the 'interest analysis' test governs choice of law issues involving contract [and] tort . . . . "). It now seems clear, however, that the conflation of the two tests is improper. The New York Court of Appeals has emphasized that the "interest analysis" used in torts is distinct from the "center of gravity" or "grouping of contacts" test used in contract. *See Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.,* 642 N.E.2d 1065, 1068-70 (N.Y. 1994); *Allstate Ins. Co. v. Stolarz,* 613 N.E.2d 936, 938-39 (N.Y. 1993); *see also Robins v. Max Mara, U.S.A., Inc.,* 923 F. Supp. 460, 465 (S.D.N.Y. 1996) ("New York has different choice of law tests for tort and contract claims.").

[6] Lazard is a general partnership with its principal place of business in New York. California enters the picture because PAMCO, the bank debt division of Protective of which Okada is a principal, is located in California.

Part I), that the relevant agreement is the oral one allegedly reached on January 28, 1994, then the fact the contract was "drafted" in New York drops out of the analysis. Nevertheless, it remains clear that New York law should control. The only other state at play on January 28 was Florida, and Florida's sole connection to the case was purely "arbitrary": Okada and Dondero happened to be attending a conference there. [7]

While it seems certain that New York law governs Lazard's breach of contract claim, it is less clear whose law should govern Protective's affirmative defense of fraud in the inducement – or to put the question even more precisely, whose law should govern the specific element of that affirmative defense at issue here: the question of whether Protective's reliance on Lazard's misrepresentations was justifiable.

Protective argues vehemently that "[w]ith respect to the central question of fraud that is at issue in this case, tort principles must govern," and hence that New York's *tort conflicts* principles should be applied to determine which state's *substantive tort law* should govern. But the cases Protective cites for this proposition hardly dictate that result. *Rosenberg v.*

[7] Protective notes that traditionally, New York courts applied the law of the place where the contract was "made" – *i.e.* the place where the second signature was affixed – *see, e.g., Max Factor & Co. v. Janel Sales* Corp., 298 F.2d 511,512 (2d Cir. 1962) (per curiam)("[T]he contract was not 'made' in New York but, rather, where the second signature was affixed."), and argues that, since traditional choice of law factors such as this one are given the heaviest weight in the analysis, *see Brink's,* 93 F.3d at 1031, California law should apply. But New York has rejected this slavish adherence to the traditional factors. And in any event, if we assume that the contract was made orally on January 28, then the place where the second signature was affixed on February 8 is irrelevant.

*Pillsbury Co.*, 718 F. Supp. 1146 (S.D.N.Y. 1989), is a case in which the plaintiffs sued for the tort of fraudulent inducement. The district court rightly concluded that the choice of law provision in the contract between the parties should not control, because, under New York law, a contractual choice of law provision governs only a cause of action sounding in contract, not one sounding in tort. *See id.* at 1150; *accord Klock v. Lehman Bros. Kuhn Loeb, Inc.*, 584 F. Supp. 210, 215 (S.D.N.Y. 1984). In the instant case, instead, there is no contractual choice of law provision at issue. And the cause of action sounds in *contract,* not in tort. It is only the affirmative defense of fraudulent inducement that resembles an issue of tort.

It is possible that, under New York's choice of law rules, the law of different jurisdictions can apply to the tort claims and the contract claims in a given suit. *See, e.g., Chappelle v. Beacon Comm. Corp.*, No. 92 Civ. 8987, 1993 WL 465312 at *2 (S.D.N.Y. Nov. 12, 1993), *appeal dismissed,* 84 F.3d 652 (2d Cir. 1996). And the New York Court of Appeals has held that "there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction." *Babcock v. Jackson,* 191 N.E.2d 279, 285 (N.Y. 1963). Here, however, there is only a contract claim, with an affirmative defense that sounds in tort. And there is no authority for the proposition that New York courts would apply the law of one jurisdiction to a breach of contract claim and the law of another jurisdiction to an affirmative defense to that claim. Nor is there authority suggesting that New York courts would apply contract choice of law principles to determine the applicable law governing a breach of contract claim and tort choice of law principles to determine the applicable law governing an affirmative defense to that claim.

In fact, the relevant authorities cut the other way. Thus, in *Stephens v. American Home Assurance Co.*, 811 F. Supp. 937 (S.D.N.Y. 1993), *vacated and remanded on other grounds sub nom. Stephens v. National Distillers and Chem. Corp.*, 70 F.3d 10 (2d Cir. 1995), the court wrote:

> [T]he defense of fraud in the inducement and the equitable rescission of a contract due to fraud are declarations that the contract was void *ab initio. Christiania Gen. Ins. Corp. v. Great Am. Ins. Co.*, 979 F.2d 268, 278 (2d Cir. 1992); *Eastern Dist. Piece Dye Works, inc. v. Travelers Ins. Co.*, 234 N.Y. 441, 138 N.E. 401 (1923). The validity of a contract must be determined by reference to the laws of the state that has the most significant relationship with and greatest interest in its formation, rather than the state in which its enforcement is sought. If there were no valid contracts in the first place, the Liquidator could hardly attempt to enforce them. . . . [S]ince New York has the greatest interest in a determination of the validity of the contracts, New York conflict of laws rules dictate that New York substantive law applies [to the affirmative defense of fraud in the inducement].

*Id.* at 946-47; *see also Morgan Guar. Trust Co. v. Republic of Palau*, 693 F. Supp. 1479, 1.495 (S.D.N.Y. 1988) (remarking in *dicta* that "[n]o authority has been cited for applying different laws to a cause of action and the affirmative defenses to that cause of action"), *on reconsideration*, 702 F. Supp. 60 (S.D.N.Y. 1988); *cf. Zurich Ins. Co. v. Shearson Lehman*

*Hutton. Inc.*, 642 N.E.2d 1065, 1070 (N.Y. 1994) (applying contracts choice of law rules: "Although Shearson urges that tort cases provide the proper analytical framework for resolving conflicts over 'tort-like issues' of punishment and deterrence, what is involved here is an insurance policy – a contract.").

Accordingly, we conclude that, under New York's conflict of law rules, New York law controls the entirety of this breach of contract claim, including the affirmative defense of fraud in the inducement and the justifiable reliance element of that defense. [8]

*III. Protective's reliance on Lazard's alleged misrepresentations*

Under New York law, in order to sustain a claim of fraud, a party must establish, *inter alia,* justifiable reliance. *See, e.g., Gouldsbury v. Dan's Supreme Supermarket, Inc.*, 546 N.Y.S.2d 379, 381 (N.Y. App. Div. 1989); *New York State Mortgage Loan Enforcement & Admin. Corp. v. Coney Island Site Five Houses, Inc.*, 491 N.Y.S.2d 671, 676 (N.Y. App. Div. 1985), *appeal dismissed,* 495 N.E.2d 357 (N.Y. 1986). It is well established that "[w]here sophisticated businessmen engaged in major transactions enjoy access to critical

[8] We note in passing that Protective, which disagrees with this holding, is the party that removed the case to the federal courts. Neither it, nor Lazard, has asked us to certify the choice of law question to the New York Court of Appeals. And we also note that it is likely – even if the affirmative defense of fraudulent inducement (or the justifiable reliance element thereof) were treated by New York as subject to tort choice of law rules – that New York in applying those rules would conclude that New York law governs. Certainly the "interest analysis" would lean that way.

information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance." *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.,* 748 F.2d 729, 737 (2d Cir. 1984). Lazard relies heavily on this and similar cases. *See Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank,* 57 F.3d 146, 156-57 (2d Cir. 1995); *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank,* 731 F.2d 112, 123-24 (2d Cir. 1984); *Frigitemp Corp. v. Financial Dynamics Fund, Inc.,* 524 F.2d 275, 282-83 (2d Cir. 1975); *First Fin. Fed. Savings & Loan Ass'n v. E.F. Hutton Mortgage Corp.,* 834 F.2d 685, 687 (8th Cir. 1987)(applying New York law); *Congress Fin. Corp. v. John Morrell & Co.,* 790 F. Supp. 459, 470-72 (S.D.N.Y. 1992). But there are significant problems with Lazard's reliance on these cases.

First, in many of these cases, there was a contractual provision expressly disclaiming reliance on any oral representations. *See Banque Arabe,* 57 F.2d at 156; *First Financial,* 834 F.2d at 687; *Grumman,* 748 F.2d at 732. These cases were therefore decided under the principle set out *in Danann Realty Corp. v. Harris,* 157 N.E.2d 597, 598-600 (N.Y. 1959), that where a party specifically disclaims reliance upon a representation in a contract, it cannot later assert that it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon. No such contractual disclaimer is present in the instant case.

Second, a number of these cases involved issues of nondisclosure, rather than affirmative misrepresentation. *See Banque Arabe, 57* F.3d at 156; *Aaron Ferer,* 731 F.2d at 123; *Frigitemp,* 524 F.2d at 282-83: *Congress Fin. Corp.* 790 F. Supp. at 470-72. Since "[f]raud by affirmative

misrepresentation, or actual fraud, and fraud by omission, or fraudulent concealment, are different causes of action and demand different elements of proof under New York law," *Congress Fin. Corp.*, 790 F. Supp. at 469, those cases are of limited importance here.

Finally, and most importantly, *all* of these cases involved situations in which the relevant facts were easily accessible to the relying party. Thus, the principle embodied in these precedents is that "[w]here the representation relates to matters that are not peculiarly within the other party's knowledge and both parties have available the means of ascertaining the truth, New York courts have held that the complaining party should have discovered the facts and that any reliance under such circumstances therefore would be unjustifiable." *Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1016 (2d Cir. 1989); *see also Compania Sud-Americana de Vapores v. IBJ Schroder Bank & Trust Co.*, 785 F. Supp. 411, 419-20 (S.D.N.Y. 1992) ("In this case, there is no basis to dispute that [plaintiff] had access to the critical information underlying its fraud claim and, had it exercised ordinary intelligence or made simple inquiries, [it] would have been able to discover the alleged misrepresentations."); *Most v. Monti*, 456 N.Y.S.2d 427, 428 (N.Y. App. Div. 1982)("It is clear that [the] information . . . was readily available to plaintiffs upon their making reasonable inquiry."); *Marine Midland Bank v. Palm Beach Moorings, Inc.*, 403 N.Y.S.2d 15, 17 (N.Y. App. Div. 1978) (the claimant "had the opportunity to examine the corporate records before assuming the obligations").

But in the instant case – proceeding as we must on summary judgment on the assumption that Protective was bound by the oral agreement of January 28, 1994 – the Scheme

Report was not in Protective's possession at the time that it committed to the deal. Protective did not, therefore, have access to the relevant information. "When matters are held to be peculiarly within defendant's knowledge, it is said that plaintiff may rely without prosecuting an investigation, as he has no independent means of ascertaining the truth." *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80 (2d Cir. 1980); *see also Tahini Investments, Ltd. v. Bobrowsky*, 470 N.Y.S.2d 431, 432-33 (N.Y. App. Div. 1984)(plaintiff may have been justified in relying on defendant's misrepresentations because he had no way of knowing that the land he purchased had in fact not been used as a horse farm, but rather as an industrial waste dump); *Todd v. Pearl Woods, Inc.*, 248 N.Y.S.2d 975, 977 (N.Y. App. Div. 1964) (even where plaintiff could have discovered the facts by inspecting public records, the court still considered the facts to be peculiarly within the defendant's knowledge such that plaintiff's reliance was justifiable), *aff'd*, 205 N.E.2d 861 (N.Y. 1965) . [9]

Lazard allegedly told Protective that it had to act fast to consummate the deal before the Scheme Report became generally available, or else it would lose its opportunity to make a

[9] In *Grumman*, this court distinguished *Mallis* and *Tahini* in broad terms: "Unlike the case before us, in *Mallis* and *Tahini*, *the* allegedly undisclosed information was only known by – and indeed only available to – the defendants, and incapable of discovery by the plaintiff, no matter how diligent its investigation." *Grumman*, 748 F.2d at 738 (footnote omitted). In light of *Todd*, however, this statement cannot be viewed as establishing that, under New York law, the information had to be available only to the defendant and absolutely unknowable by the plaintiff before reliance can be deemed justified. *See Mallis*, 615 F.2d at 80 ("[I]ndeed some cases have imposed liability in situations in which plaintiff could have determined the truth with relatively modest investigation.").

profit. Murphy admits that he told Okada that Lazard knew the situation concerning the MCC bank debt as well as, or better than, anyone else. Okada was dealing from a pay phone in Disney World, and was forced to rely on Murphy's representations or lose his chance to capitalize on the opportunity. According to Protective – whose evidence we take as valid at summary judgment – Lazard set the whole deal up in such a way that Protective had to rely on Lazard's representations and had to commit itself to purchase the MCC bank debt before it had the opportunity to examine the Scheme Report. It would therefore appear that Protective might have been justified in relying on Lazard's alleged misrepresentations when it orally committed itself to purchase the MCC bank debt on January 28, 1994. [10]

This conclusion, nevertheless, seems to us to be too simple. As a substantial and sophisticated player in the bank debt market, Protective was under a further duty to protect itself from misrepresentation. It could easily have done so by insisting on an examination of the Scheme Report as a condition of closing. *See Rodas v. Manitaras,* 552 N.Y.S.2d 618, 620 (N.Y. App. Div. 1990).

> [W]here, as here, a party has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation *or inserting*

[10] If on the other hand, Lazard is able to establish on remand that the contract was not formed until Protective signed the Written Confirmation on February 8, 1994, then, as the district court found, Protective's reliance was not justified, and Lazard will be entitled to judgment as a matter of law.

> *appropriate language in the agreement for his protection,* he may truly be said to have willingly assumed the business risk that the facts may not be as represented. Succinctly put, a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament.

*Id.* (emphasis added). [11] We believe that the failure to insert such language into the contract – by itself – renders reliance on the misrepresentation unreasonable as a matter of law. *See Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.,* 583 N.Y.S.2d 478, 479 (N.Y. App. Div. 1992).

This, however, does not resolve the case. For Protective does, in effect, claim that it inserted just such appropriate language into the agreement. That claim is intimately connected with Protective's alternate theory on appeal: that, due to the

[11] *Rodas* was a case in which the contract contained an express disclaimer of reliance clause, thus bringing it under the rule of *Danann. See Rodas,* 552 N.Y.S.2d at 619-20. While its precedential value in this case would therefore appear suspect, the principle for which it is here cited has been reaffirmed in a case that did not involve a contractual disclaimer of reliance. *See Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.,* 583 N.Y.S.2d 478, 479 (N.Y. App. Div. 1992). It is true that the references to the duty to secure protective contractual language in both *Rodas* and *Curran* are *dicta* insofar as in each of those cases the information was not peculiarly within the defendant's knowledge. We nonetheless find this *dicta* indicative of the law of New York, *see also Shepherd v. Whispering Pines, Inc.,* 591 N.Y.S.2d 246, 249 (N.Y. App. Div. 1992), and note that neither party has sought certification on this issue.

failure of the condition precedent, Lazard cannot seek enforcement of the contract.

*IV. Failure of the condition precedent*

Protective's second affirmative defense is failure of the condition precedent. At the time of the January 28 oral agreement, the parties agreed, consistent with the general practice in the bank debt market, that their deal was "subject to documentation." Likewise, the Written Confirmation expressly noted that it was "conditioned upon the preparation, review and execution of documentation acceptable to Lazard and Protective." [12]

[12] One aspect of Protective's condition precedent argument is easily disposed of. Protective argues that, since this closing documentation was never prepared, the condition precedent to the final binding contract was never met. Of course it would be ridiculous to suggest that a party can agree to a contract, decide not to bother to negotiate the closing documentation, and, then defend in a breach of contract suit on condition precedent grounds. *See, e.g., Teachers Ins. & Annuity Ass'n v. Butler,* 626 F. Supp. 1229, 1234-36 (S.D.N.Y. 1986)(refusal to negotiate closing documentation is a breach of an implicit good faith obligation to do so), *appeal dismissed,* 816 F.2d 670 (2d Cir. 1987). But Protective's argument is somewhat different. It claims that its failure to negotiate was justified by the fact that it had learned of Lazard's fraud in the inducement. Protective suggests that, even if its reliance was unjustifiable as a matter of law, such that it could not establish fraud, it still was justified in failing to negotiate in good faith, since Lazard had behaved in bad faith in making the initial misrepresentations. But allowing this claim would undermine the legal principle that a party cannot avoid the effects of a contract on fraud grounds unless its reliance was justifiable. Protective's argument on this score is an impermissible attempt to do an end run around the elements of a New York claim of fraud.

According to Protective, Okada believed that the fact that the contract was conditioned upon review of documentation meant that he could review the Scheme Report in the course of preparing and reviewing the closing documentation and, if unsatisfied with its contents, could void the agreement. In other words, Protective argues that in the January 28 agreement it retained the right to perform some due diligence by examining documents (including the Scheme Report) at any time prior to closing, and that its signing of the Written Confirmation in no way altered this fact. This is, of course, what Protective attempted to do. When Okada got around to reading the Scheme Report while reviewing the final documentation, he discovered Lazard's alleged misrepresentations and refused to negotiate further.

It is thus Protective's contention that it did secure the necessary contractual provision protecting it from Lazard's misrepresentations; it did this by retaining the right to back out of the contract upon independent review of the document that contained the facts that were peculiarly within Lazard's knowledge. Although Protective thereby claims what amounts to a month-long option to purchase a volatile security at a fixed price, this contention cannot be rejected summarily on this record, which contains very little uncontested information about the practice of the industry, the parties' course of conduct, or the financial consequences of the parties' contentions. For this argument ultimately to succeed at trial, the fact finder must be convinced that the Scheme Report was included within the "documentation" that Protective was permitted to review before closing. It must also be convinced that the examination that was contemplated could occur after the signing of the Written Confirmation. Both of these may be hard to prove. They are not, however, out of the question, and so at summary

judgment we must assume them unless Lazard can point to uncontroverted evidence to the contrary.

Lazard responds by noting that the Written Confirmation provides that the deal is conditioned upon the "preparation" and "execution" of documentation, and therefore obviously refers only to documents to be drawn up by the parties, not documents already in existence. But the Written Confirmation actually refers to "preparation, *review* and execution of documentation" (emphasis added), which might imply that the word "documentation" embraces documents other than those to be drawn up by the parties. And the Scheme Report, though it had been forwarded previously, was also included among the closing documents forwarded later by Lazard to Protective. Moreover, to the extent that the Written Confirmation is ambiguous, it should be construed against the drafter – in this case, Lazard. *See, e.g., Westchester Resco Co. v. New England Reinsurance Corp.*, 818 F.2d 2, 3 (2d Cir. 1987) (per curiam)("Where an ambiguity exists in a standard-form contract supplied by one of the parties, the well-established *contra proferentem* principle requires that the ambiguity be construed against that party.") Under the circumstances, and at this stage in the proceedings, we cannot say that the Written Confirmation establishes that the Scheme Report was not one of the documents meant to be approved before closing. *Cf. Sayers*, 7 F.3d at 1094 (summary judgment is inappropriate in a contract dispute when the meaning of the contract is ambiguous).

In any event, the Written Confirmation is only relevant insofar as it sheds light on the oral contract it allegedly confirmed: the agreement of January 28, 1994. Accordingly, what matters is the parties' understanding of the phrase "subject to documentation" as they used it on January 28. This phrase

cannot be taken unambiguously to exclude the Scheme Report. The record is replete with testimony by Okada that he understood "documentation" to include the Scheme Report. And there is no statement in the record to the contrary from any of Lazard's witnesses. [13]

We cannot, therefore, say as a matter of law that the agreement did not allow Protective the right to void the contract upon review of the Scheme Report at any time before execution of the final closing documents. We cannot conclude, that is, that Protective failed to act reasonably or to undertake due diligence, since it may have retained the right, up to the closing, to determine whether Lazard had accurately represented the Scheme Report's contents.

It is possible to read the contract a) as having been made on January 28, 1994, b) as requiring a purely ministerial signing of a Written Confirmation, and c) as being, nonetheless, subject to voiding at any time before the closing on diligent examination of documents, including the Scheme Report. If the contract did date from January 28 and did give Protective this right of review, and if Lazard did misrepresent the contents of the Scheme Report, then Protective's refusal to close the deal was justified and Lazard may not recover for breach of contract.

By casting this argument as a separate defense, Protective implies that if it convinces the finder of fact that it retained the

[13] Lazard again seems to claim that anyone familiar with the bank debt market would understand that this was not the case. But Lazard has provided no testimony to that effect, and its claim is contradicted by the testimony of Protective's principals, who are themselves major players in the bank debt market.

right to review the Scheme Report prior to closing, it should prevail regardless of the date at which it became bound. We disagree. The Written Confirmation is ambiguous only to the extent that it is being used to indicate the parties' intent on January 28, when the earlier oral agreement was reached. If, instead, there were no binding oral contract, we would find the Written Confirmation unambiguous as a matter of law. In the absence of specific contractual language, we do not see how a sophisticated party, claiming to rely on the other party's representations of the contents of a critical document, can assert that it had the right to review that document at any time prior to closing even though it had possession of the key document for nearly a week before making the contract.

## CONCLUSION

Applying New York law, which we hold governs this dispute, we find that there exist genuine issues of material fact as to 1) the date at which the parties entered into the contract, and 2) whether Protective had the right under the contract to refuse to close the deal upon review of the Scheme Report. We therefore vacate the district court's grant of summary judgment and remand the case for further proceedings. It should be noted that if the finder of fact determines that the operative date of the contract was February 8, 1994, or, regardless of the date at which Protective became bound, if the finder of fact concludes that Protective did not have the right to void the deal upon review of the Scheme Report after having signed the Written Confirmation, then Lazard must prevail as a matter of law. On the other hand, if Protective is able to establish that it was bound by the January 28, 1994, oral agreement, subject to a right to review the Scheme Report prior to closing, and that Lazard materially misrepresented the contents of the Scheme

Report in convincing Protective to purchase the MCC bank debt, then Lazard will not be able to recover for breach of contract.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LAZARD FRERES & CO.,

Plaintiff,

-against-

THE PROTECTIVE LIFE INSURANCE CO.,

Defendant.

----------x

MEMORANDUM AND ORDER
94 Civ. 3959 (WK)

WHITMAN KNAPP, SENIOR D.J.

Facts

On this motion for summary judgment, we must accept as true the facts alleged by the nonmovant.

Plaintiff Lazard Freres & Co. ("Lazard") is an investment bank and registered broker-dealer, with its principal place of business in New York. Lazard trades in a variety of securities and other instruments, including bank debt. At all times here relevant, Kevin Murphy, Michael Weinstock and John Doyle worked in Lazard's high yield bond department, which was responsible for Lazard's transactions in high yield bonds and bank debt. Defendant The Protective Life Ins. Co. ("Protective") is a Tennessee insurance company which had its principal place of business in Alabama. It manages a $7 billion investment portfolio on behalf of its policyholders. Protective Asset Management Corp. ("Protective Asset"), a subsidiary of Protective, is based in California. In the five years prior to the

transaction at issue in this case, Protective had entered into hundreds of bank debt transactions involving commitments in excess of $1 billion, and was one of the biggest debt players in the marketplace. At all times here relevant, Mark Okada and James Dondero were principals of Protective Asset, and Dondero was also Vice-President of Protective.

In early 1994, Lazard was seeking to sell a piece of bank debt issued by Maxwell Communications Corporation ("MCC bank debt") that it had committed to purchase from a customer. On the morning of January 28, 1994, Murphy, a Lazard sales representative, called the California office of Protective Asset and left an "urgent" message for Mark Okada. Later that same morning, Okada, who was then attending a high yield bond conference in Orlando, returned the call. During the ensuing conversation, Murphy and Michael Weinstock, a Lazard analyst, discussed with Okada the MCC investment opportunity. Murphy and Weinstock represented to Okada that they had knowledge of the contents of the First Scheme Report (the "Report") regarding MCC and that such report would verify that twenty percent of the face value of the MCC bank debt would be paid in March 1994. Weinstock represented that the Report stated that there were no pending litigations against MCC that could reduce the sums that MCC might recover through ongoing litigation. They also advised Okada that the Report would be available the following week and that, in light of facts stated in the Report, the current price of the MCC claims would appreciate. They urged Protective to move quickly on this opportunity. Okada did not commit to purchase the MCC bank debt during this phone call, opting to get back to Murphy after discussing the proposed transaction with his boss, James Dondero. Dondero, who was with Okada in Orlando, required Okada to obtain oral representations from

Lazard that "the 20 cents of the 41 cents we were paying was escrowed, bullet-proof, coming to us in March," before he would authorize the trade.

Later that day Okada called Murphy and Weinstock and committed to purchase approximately $10 million of MCC bank debt for $3,721, 517.58 plus the U.S. dollar equivalent of £231,443.79 British pounds sterling – *i.e.*, at 41.5 percent of the face amount of the obligations; and the parties agreed to proceed to execution of a written commitment agreement that Lazard would send Protective. Before calling them back, Okada had not performed any independent due diligence or otherwise obtained information about MCC or its bank debt. The Report became publicly available on January 31, 1994, and on February 2, Protective received from Lazard (by Federal Express) a copy of the Report. Although it was at all times available to him, Okada did not read the Report until after February 8, when he signed the Commitment Agreement.

On February 8 and 9, 1994, Lazard forwarded to Protective's counsel the closing documents for the purchase of the MCC debt. However, Protective refused to review or negotiate the closing documentation. In early March, the market price of MCC debt having substantially dropped, Protective advised Lazard that it would not close the transaction. Lazard resold the MCC bank debt to another purchaser for $3,228,304.41 plus the U.S. dollar equivalent of £201,365.34 British pounds sterling, suffering a loss of $538,210.53.

Lazard moves for summary judgment on its breach of contract claim. Protective interposes an affirmative defense of

fraud in the inducement or, alternatively, failure of a condition precedent.

Discussion

The parties disagree as to which state's laws should apply to the underlying breach of contract claim and to the fraud defense. With respect to contract claims, New York's choice-of-law analysis uses the "grouping of contacts" test. *Matter of Allstate Ins. Co.*, (1993) 81 N.Y.2d 219, 587 N.Y.S.2d 904. It seems clear that New York law applies to Lazard's claim for breach of contract. The contract at issue was drafted in New York, negotiated in New York and Florida, and executed in New York and California. Under New York conflicts rules, the center of gravity of the MCC transaction was New York, not California or Florida. Alabama and Tennessee had absolutely no contact with this contract, except for being the principal place of business and the place of incorporation, respectively, of Protective.

Protective concedes that, absent fraud, the Commitment Agreement constituted a binding contract for the sale of MCC bank debt, subject to "preparation, review and execution of documentation acceptable to Lazard and Protective." New York courts have found that similar agreements were binding. *See, e.g., Arcadian Phosphates Inc. v. Arcadian Corp.* (2d Cir. 1989) 884 F.2d 9; *Teachers Ins. and Annuity Ass'n of America v. Tribune Co.* (S.D.N.Y. 1987) 670 F. Supp. 491; *Pan Am Corporation v. Delta Air Lines* (S.D.N.Y. 1994) 175 B.R. 438. Accordingly, we find that the Commitment Agreement constituted a binding contract whereby Protective was to purchase

MCC bank debt, subject to the parties' agreement on closing documentation.

With respect to Protective's fraud defense, Protective argues that Alabama law or California law applies and not New York law. Each of these jurisdictions require a fraud claimant to establish "reliance" as an element of its fraud claim. The parties agree that with respect to the type of reliance that a fraud claimant would need to establish in order to prevail on its claim, Alabama's law on fraud is the most favorable to Protective.

Accordingly, for present purposes, we shall assume that Alabama law is controlling.

In acknowledging Murphy's and Weinstock's oral representations, Okada indicated to them that he required an assurance that these representations were accurate because he had no opportunity to check them. Protective argues that "the understanding that [it] was relying on Lazard was so central an element of this discussion, that Lazard's representations as to the contents of the Scheme Report can fairly be said to have amounted to warranties." Def.'s Br. at 34. Protective also argues that Murphy and Weinstock indicated during the conversations of January 28 that Lazard had information relating to MCC and the contents of the Report that was particularly within Lazard's knowledge.

For purposes of this motion, we must assume that Murphy and Weinstock, Lazard's agents, made materially erroneous representations about the Report. However, there is no contention that Murphy and Weinstock made any other representations to Okada, except for their claim to peculiar

knowledge of the content of the Report which was in Protective's actual possession for six full days before the Commitment Agreement was signed.

After studying pertinent Alabama law, we find no case directly on point (*i.e.*, where the allegedly false statements by a seller purported only to interpret a specific document, and the buyer refused to read that document after having it in its actual possession). However, we are confident that Alabama courts would not consider such conduct on a buyer's part to constitute "justifiable reliance." *McCullogh v. McAnalley* (Ala. 1991) 590 So.2d 229, 234; *Harris v. M&S Toyota. Inc.* (Ala. 1991) 575 So.2d 74, 78; *Johnson v. State Farm Insurance Company* (Ala. 1991) 587 So.2d 974; *Hickox v. Stover* (Ala. 1989) 551 So.2d 259, 263; *Southern States Ford. Inc. v. Proctor* (Ala. 1989) 541 So.2d 1081, 1091-92 (Hornsby, C.J., concurring specially); *Simmons v. Woerner Brothers Partnership* (Ala. Civ. App. 1995) 1995 WL 546061, "1-"2; *Real Estate Financing v. Resolution Trust Corp.* (11th Cir. 1992) 950 F.2d 1540, 1544. Accordingly, we find that Protective's fraud defense must fail.

We now address Protective's remaining contention that the finalization of the closing documents was a condition precedent to enforcement of the contract, and that this condition was not satisfied. It is undisputed that the Commitment Agreement was conditioned upon the "preparation, review and execution of documentation acceptable to Lazard and Protective." It is also undisputed that Lazard sent Protective the closing documentation necessary to finalize the MCC transaction and that Protective refused to negotiate that documentation. Normally, the execution of a binding preliminary agreement requires a party to continue good faith efforts to

finalize a contract. *See Teachers Ins. & Annuity Ass'n v. Tribune Co.* (S.D.N.Y. 1987) 670 F. Supp. 491, 498 (finding that a binding preliminary agreement bars a party from abandoning negotiations).

Protective contends that it did not act in bad faith in refusing to negotiate the closing documents because it believed Lazard had committed fraud. Under the circumstances of this case, we cannot find that a person who refuses to read a document that has been in its possession for six days can, as a matter of law, justifiably contend that it was defrauded by misrepresentations as to the contents thereof. Therefore, Protective failed as a matter of law to negotiate in good faith, and such conduct excused the failure of the condition precedent.

Accordingly, plaintiff's motion for summary judgment is granted.

SO ORDERED

May 1, 1996
New York, New York

/s/ Whitman Knapp, Senior U.S.D.J.
WHITMAN KNAPP, SENIOR U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LAZARD FRERES & CO.,

Plaintiff,

-against-

THE PROTECTIVE LIFE INSURANCE CO.,

Defendant.

----------x

JUDGMENT
94 Civ. 3959 (WK)

Plaintiff having moved by Notice of Motion dated February 9, 1996, for an Order, pursuant to Fed. R. Civ. P. 56, granting plaintiff summary judgment on its first and second claims in the amount of $538,210.53, plus interest and costs, and granting plaintiff summary judgment on defendant's Counterclaim, and dismissing such counterclaim; and

The Court having rendered its decision by Memorandum and Order dated May 1, 1996; it is hereby

ADJUDGED AND DECREED as follows:

1. Plaintiff's motion for summary Judgment on its first and second claims is granted, and Judgment is hereby entered against defendant The Protective Life Insurance Company in the amount of $538,210.53, plus interest at the rate of 9% from February 21, 1994, to the date hereof, such interest totaling $107,096.52.

2. Defendant's Counterclaim is dismissed.

3. Plaintiff is awarded the costs of this action, as taxed by the Clerk of Court.

May 13, 1996
New York, New York

/s/ Whitman Knapp, Senior U.S.D.J.
WHITMAN KNAPP, SENIOR U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

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George Lange III
Clerk

DC: NY NY
DC No: 94-cv-3959
DC Judge: Knapp

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of April one thousand nine hundred and ninety seven

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Present:

Hon. Dennis G. Jacobs
Hon. Guido Calabresi
Hon. Ellsworth A. Van Graafeiland
CIRCUIT JUDGES,

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Lazard Freres & Co.

v.

Protective Life

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A petition for rehearing having been filed herein by Protective Life Insurance Company

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

GEORGE LANGE III, Clerk

By: /s/
Beth J.Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NOTICE OF MOTION
for stay of mandate pursuant to Fed. R. App. P. 41(b)
Docket No. 96-7664

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LAZARD FRERES & CO.,
Plaintiff-Counter-Defendant-Appellee,
v.
PROTECTIVE LIFE INSURANCE COMPANY,
Defendant-Counter-Claimant-Appellant.

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Motion by: J. Douglas Richards
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30 Rockefeller Plaza
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(212) 408-2400

Opposing Counsel: Brad S. Karp
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

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Has consent of opposing counsel:

| | | | |
|---|---|---|---|
| A. | been sought? | ☐Yes | ☒ No |
| B. | been obtained? | ☐Yes | ☒ No |

| | | |
|---|---|---|
| Has service been effected? | ☒ Yes | ☐ No |
| Is oral argument desired? | ☐Yes | ☒ No |

Has argument date of appeal been set:? Already held

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Stay of mandate for 30 days, pursuant to Rule 41(b), Fed. R. App. P., pending application to the Supreme Court for a writ of certiorari.

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By: J. Douglas Richards
Appearing for: Protective Life Insurance Company

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant

Date: May 1, 1997

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IT IS HEREBY ORDERED that the motion be and it hereby is **DENIED**.

/s/ Ellsworth A. Van Graafeiland (per DGJ)
/s/ Dennis G. Jacobs
/s/ Guido Calabresi (per DGJ)
Circuit Judge

Date: 5/5/97